No. 2561.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CHU TAI NGAN,

Appellant,

vs.

SAMUEL W. BACKUS, Commissioner of Immigration at the Port of San Francisco,

Appellee.

BRIEF OF APPELLEE

JOHN W. PRESTON,
United States Attorney,
WALTER E. HETTMAN,
Assistant United States Attorney,
Attorneys for Appellee.

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STATEMENT OF FACTS

The facts as set forth by the immigration record attached to the petition are that the petitioner Chu Tai Ngan came to the United States in June, 1910, on the steamship "Nippon Maru" with her husband, a native-born citizen of the United States. Two months later the husband left her and has not lived with her since. On November 21, 1912, this alien was taken into custody in a raid on No. 20 St. Louis alley over 921 Grant avenue, along with other prostitutes. Petitioner was given a preliminary hearing on the 21st of November and on the 23rd an application for a warrant of arrest was sent to the Secretary of Labor,

which warrant of arrest finally arrived on the 25th of November, upon which the alien was duly arraigned and advised of her rights. About two days later an affidavit of Sergeant Layne, who was then a member of the Chinese Squad of the city police force, was duly made and entered in the record. The final warrant of deportation was issued on December 30th.

The matter then came up in this Court on January 23, 1913, on a petition for a writ of *habeas corpus* and Judge Dietrich, sitting in the District Court, denied the writ and remanded the woman to custody. An appeal was then taken to the Supreme Court of the United States. Perfection of the appeal in the Supreme Court was deferred until January, 1914, at which time the appeal was dismissed, the woman was again surrendered to the immigration officials and a new petition for a writ of *habeas corpus* was sued out on March 20, 1914, to which the government on behalf of respondent, Samuel W. Backus, Commissioner of Immigration at Angel Island, Cal., interposed its demurrer. Upon submitting the matter, Judge Dooling, on June 9, 1914, made the following finding and decision:

> "The hearing herein was not unfair. The only evidence against the petitioner tending at all to show that she was a prostitute is the affidavit of Arthur D. Layne. The evidence against petitioner contained therein is very slight, but I cannot say that it contains no evidence upon which the Secretary of Labor could base his finding. The demurrer to the petition will therefore

be sustained, and the application for a writ of *habeas corpus* denied."

WAS THERE SOME EVIDENCE IN THE RECORD?

Counsel for appellant state that they relied upon only one point of error and that is that the District Court erred in not ruling that the Secretary of Labor had no evidence upon which to base his finding, or in other words, "That the warrant of deportation and the finding or judgment contained therein was not based upon or sustained by any material evidence."

In the application for a warrant of arrest dated November 23, 1912, which is in the form of an affidavit (Trans., 13, 14), there is the following allegation of facts:

> "This alien arrived ex 'Nippon Maru,' June 17, 1910. She was found in a raid conducted by this office at 20 St. Louis alley, being over 921 Grant. ave. *This is the same house which was raided before in which two girls were found practicing prostitution and ordered deported, their names being Yuk Ping, Dept. #52143/15 and Chan Kam, Dept. #53210/38-C. This is also a well known house of prostitution by police records. Chu Tai Ngan has every appearance of being a Chinese prostitute and was arrested by S. F. police some three months ago in a raid by them and paid a fine of $50, as practicing prostitution."*

Not only does the record show throughout that the woman was arrested with prostitutes in an immoral

house, but there is the further testimony of Sergeant Layne, who, in an affidavit (Trans., 27) states that he identified the woman as the same person he arrested for being an inmate of an immoral house on March 22nd, 1912, and further states that he knows that the place of her last arrest, 921 Grant avenue, to have the general reputation of being a house of prostitution and also that the woman, when arrested, forfeited bail at the time of her trial. He further states that her attorney, Benj. J. Block, informed the Court at the time of her non-appearance that she forfeited her bail because she feared arrest by the immigration officials. This we contend is at least *some* evidence. At any rate, the Secretary of Labor had jurisdiction of the case and in his judgment considered the facts ample to rule for deportation. Shall this ruling be overturned by the District Court where there is at least *some* evidence? Out of five witnesses the Secretary of Labor may not believe four and give credence to one. That is entirely within his prerogative.

The question of the District Court reopening the merits and facts of the case where the Secretary of Labor has rules and where the proceedings were regular was emphatically commented upon in the case of *Ex parte Chin Hen Lock,* 174 Fed. 282, 286-7, in which the Court said:

> "It is not the province of the district judge *to try the facts* upon which a Chinese immigrant claims the right to enter the United States. Con-

> gress has provided that all these facts are to be heard by the appropriate immigration officers. * * * It has been held by the Supreme Court that a hearing by that tribunal is due process of law. *United States* v. *Ju Toy,* 198 U. S. 253. * * * Some of the judges of the Circuit Court of Appeals have stated that this decision has been somewhat modified by the Chin You case, 208 U. S. 8. * * * I do not so understand it. The Chin You case simply holds that where an applicant claiming to be an American citizen by birth had no trial, or the hearing before the inspector gave the applicant no 'chance to establish his right' in the mode provided by the statutes, or his hearing was not conducted 'in good faith', however summary, it is the duty of the courts to take jurisdiction; otherwise not. * * * The opinion in this case is entirely consistent with that in the Ju Toy case. * * * Applying the principle that the district judges are not to interfere with the conduct of the immigration officer or the Honorable Secretary of Commerce and Labor in the performance of their statutory duty, where they have given the applicant a fair hearing, *however they may have weighed and decided the facts,* if they have acted in good faith, the judges should keep their hands off."

In *In re Tang Tung,* 168 Fed. 488, 496, there is a statement in the opinion on the question of the District Court weighing the evidence as follows:

> "That, after examining the record and finding that a *bona fide* hearing had been granted, 'under such circumstances we do not understand * * * that any court is authorized to review the action of the Department of Commerce and Labor in the matter of admitting *or weighing evi-*

dence, or to consider whether the conclusions drawn by its officials were right or wrong.' "

The case of *Ex parte Lee Kow,* 161 Fed. 592, is in accord with the cases just cited:

> "This court cannot grant a writ and in effect reverse and set aside the decision of the inspector and department on the ground it may think there was *sufficient evidence to warrant a decision the other way, or that there was a preponderance of evidence in favor of the petitioner.* See cases cited. When a question of fact is presented for the decision of these *quasi*-judicial officers, and that question is honestly passed upon, it is final and conclusive on the courts if a full opportunity to be heard was given."

The case of *White* vs. *Gregory,* 213 Fed. 768, Circuit Court of Appeals, Ninth Circuit, Judge Morrow ruled that the courts would not weigh or inquire into the sufficiency of the evidence.

> "In the present case the executive officers found that the aliens were persons likely to become a public charge. This is a ground of exclusion provided by law. In reaching this conclusion the officers gave the aliens the hearing provided by the statute. *This is as far as the court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusion reached by the officers."*

The fact that the alien denied that she was engaged in any immoral practices (Trans., 19) or that she ever went to this particular house to practice prostitution

may be evidence by her very contradictions, as was held in the case of *Quock Ting* vs. *United States,* 140 U. S. 417, where it was decided that the immigration board is not bound in any way to believe the statements of the alien.

> "He may be contradicted by the facts he states as completely as by direct adverse testimony. * * * His manner, too, of testifying may give rise to doubts of his sincerity and create the impression that he is giving wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

Counsel for alien contend that the case of *Frick* vs. *Lewis,* 233 U. S. 291, gives the Court the power to review the evidence submitted to the Secretary of Labor. It is believed that the Supreme Court did not intend to convey such an impression. The Court held in that case that the acquittal of the alien upon a trial before a jury in a court of law was not binding upon the Secretary of Labor in determining the facts under a deportation proceeding. Justice Pitney said:

> "The court also held that the acquittal of Lewis was not *res adjudicata* of the present proceeding, and that since there was evidence tending to support the findings of the Secretary of Commerce and Labor respecting the bringing in of the woman for the purpose of prostitution, that finding was conclusive."

It appears that the Supreme Court's sole inquiry

in that case was whether or not there was any justification for the Secretary's findings on the evidence.

> "Were there doubt whether the testimony itself, without the documentary evidence, would support the action of the Secretary of Commerce and Labor, we should be inclined to say that a court ought not set aside that action without at least requiring the production of the exhibits that were presented to the Secretary. *But, without regard to them, enough appears to show that he was fully justified in concluding as a matter of fact that the whole story of the marriage in Warsaw was a fabrication,* and that in truth Lewis went from Detroit to Windsor upon information from which he inferred that the woman was an alien and a prostitute, willing to accompany him to Detroit for an immoral purpose, and that he brought her to Detroit for that purpose.
>
> "This being so, and there being no contention that the hearing was not fairly conducted, *the finding of the Secretary upon the question of fact is binding upon the courts. Low Wah Suey* v. *Backus,* 225 U. S. 460, 468, 56 L. ed. 1165, 1167, 32 Sup. Ct. Rep. 734; *Zakonaite* v. *Wolf,* 226 U. S. 272, 275, 57 L. ed. 218, 220, 33 Sup. Ct. Rep. 31."

It is indeed difficult to understand in what way the United States Supreme Court in the cases of *Lewis* vs. *Frick, supra,* and *Zakonaite* vs. *Wolf,* 226 U. S. 272, have changed its ruling from the doctrine pronounced in the case of *Chin Yow* vs. *United States,* 208 U. S. 8, in which Justice Holmes held that an inquiry into the facts and the evidence was not open until it was first established that there had been an irregular or unfair hearing.

"If the petitioner was not *denied a fair opportunity to produce the evidence* that he desired, or a fair, though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the District Court. If it has any jurisdiction at all, *in must not be supposed that the mere allegation of the facts opens the merits of the case* whether those facts are proved or not. * * * But unless and until it is proved to the satisfaction of the judge that a hearing properly so called, was denied, the merits of the case are not opened and we may add, *the denial of a hearing cannot be established by proving the decision was wrong.*"

In the case of *Low Wah Suey* vs. *Backus,* 225 U. S. 468, Justice Day ruled that the decisions of the executive officials of the Immigration Department on the facts and evidence were sound, unless it was shown that their action was such as to prevent a fair investigation.

"A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were *manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation,* or that there was a manifest abuse of the discretion committed to them by the statute. *In other cases the order of the executive officers within the authority of the statute is final. U. S.* v. *Ju Toy,* 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; *Chin You* v. *U. S.,* 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; *Tang Tun*

v. *Edsel,* 223 U. S. 673, *ante* 606, 32 Sup. Ct. Rep. 359."

In this appeal it is not claimed that there was any irregularity or unfairness in the proceedings in conducting the hearings according to the immigration rules and regulations. The only point relied upon by counsel for the appellant is that the evidence was insufficient. In view of the many decisions which hold that the courts will not question the amount or sufficiency of the evidence until it is shown that a proper or fair hearing before the Immigration Bureau was denied, it is respectfully requested that the order of the District Court in denying the petition for the writ of *habeas corpus* be sustained.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

WALTER E. HETTMAN,
Assistant United States Attorney,
Attorneys for Appellee.